COURT OF APPEAL.

G. H. Conaghan for the Appellant.

C. V. Boyle (D. P. P.) for the Respondent.

The Judgment of the Court was delivered by :—

Pretheroe, Ag. C. J. : —At the trial of this case there were two accused, viz: Lee Swee Sin and Liew Sang. They were both charged firstly with committing gang-robbery with murder contrary to section 396 of the Penal Code, and secondly with abduction with intent secretly and wrongfully to confine a person, contrary to section 365 of the Penal Code. Mr. G. H. Conaghan appeared for both accused and the learned Judge was assisted by assessors.

At the end of the case for the prosecution the learned Judge advised both accused of their rights, and the first accused elected to give evidence. He also called one witness who gave evidence on his behalf. The second accused elected to say nothing.

The next entry in the record shows that "Mr. Conaghan calls him" (i.e. second accused) "as a witness". Now, section 191 of the Criminal Procedure provides as follows :—

> "The accused or his advocate may then open his case, stating the facts or law on which he intends to rely and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any), and after their cross-examination, and re-examination (if any) may sum up his case.
>
> Provided always that if any accused person elects to be called as a witness, his evidence shall be taken before that of other witnesses for the defence.
>
> Provided also that any accused person, who elects to be called as a witness, may be cross-examined on behalf of any other accused person".

The first proviso to this section makes it abundantly clear that an accused person has the right to decide whether or not he will be a witness in the case, and consequently, unless he so elects, he cannot be "called" as a witness by, or on behalf of, anyone. Although he had elected to say nothing there is nothing in the record to indicate that he was warned that if he gave evidence on behalf of the first accused, he was liable to be cross-examined generally as to his own participation in the crime, and both Mr. Conaghan and counsel for the respondent (who were the counsel at the trial) assured the Court that no such warning was in fact given. In the event his evidence, if believed, completely exonerated the first accused, but his answer to the first question in cross-examination was "I took part in the ambush with ten others". It need scarcely be added that this answer was prejudicial to the second accused to the highest degree, and at the end of the trial, the first accused was acquitted on both counts, but second accused was found guilty on both counts. In our opinion, as the second accused had validly exercised his right neither to give evidence nor make a statement, it was not open to counsel to call him as a witness for first accused. We therefore quashed the conviction of second accused and ordered that he be re-tried.

Re-Trial Ordered.

LEONG SIEW MUN vs. K. SOCKALINGA MUDALIAR.

[Ipoh — Civil Application No. 3 of 1946 (Evans, J.) October 24, 1946]

Landlord and Tenant — Whether tenant has right to apply to Rent Board for permission to eject sub-tenant — Meaning of words "landlord" and "tenant" — Rent and Charged Land (Restriction) Enactment.

The question in this case was whether a tenant has the right to apply to the Rent Board for permission to eject his sub-tenant. The applicant was holding under a lease and it was argued that he was a tenant and was as such expressly excluded from the definition of landlord.

Held, that the tenant had the right to apply to the Rent Board for permission to eject his subtenant.

Case referred to :—

(1) *Logan v. Fair* (1922) S.C. 76.

CIVIL APPLICATION.

Yeoh Cheang Lee for the Applicant.

K. Macduff for the Respondent.

Evans, J. : —The parties to this reference filed statements of their cases and to-day appeared before me in support of them. Mr. Cheang Lee for the applicant before the Board stated that they had nothing to add to the statements put in but drew attention to the case of *Logan v. Fair*[1] where it was held that one who was a farmer holding of his wife and who demised to a third party, was the landlord in respect of that letting under the wording of the Scottish Act then applicable which is in the same terms as the definition of landlord in the Rent and Charged Land (Restriction) Enactment 1940.

Mr. Macduff reiterated his argument that applicant could not be regarded as a landlord because he was in fact holding under a lease, he was a tenant and was as such expressly excluded from the definition of landlord.

Tenant is an ancient word in land law and bears a variety of meanings. It may well include the free holder himself, though that meaning would virtually exclude from the definition of landlord anyone owning land. I have no doubt the word is used relatively and must be applied according to the relationship of the parties to the dispute. It has always been the practice in England whether a lease is granted by a freeholder or a lease holder to refer therein to the lessor as the landlord and the lessee as tenant, and I feel no doubt tenant is used in this definition in a similar sense. Tenant is specifically defined as including sub-tenant and sub-tenant should when necessary be substituted here.

Were the words excluding the tenant omitted from the definition, landlord would normally mean tenant as the person entitled to possession, statutory tenants being the exception. The landlord is not normally in possession, and only entitled to possession on the reversion, but the Enactment contemplates a new position. While a true tenancy exists the Enactment cannot generally apply, the landlord is not entitled to possession because he has created an interest carrying the possession. He cannot increase the rent since that is fixed by agreement in the lease. It is only when the normal tenancy has determined and the landlord would be entitled to possession that the Enactment fully operates and for that the definition provides. In addition to the true landlord, the term must include one who is landlord not by agreement or devolution of title but by force of the Enactment, and this is he who is entitled to possession or would be but for the Enactment. His right however may be defeated by the tenant, and the tenant must therefore be excluded from the definition based on a right to possession. This tenant however is he who is entitled to immediate possession and no other. It may mean a lessee of a leaseholder, but it cannot mean a leaseholder who is not entitled to possession.

Judgment Accordingly.